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No. 10-1275

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES CONSTANT,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
acting by and through the Department of
Transportation, Real Party in Interest,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of California,
4th Appellate District

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner James Constant, in propria persona, respectfully prays that a rehearing is required on grounds limited to intervening circumstances of a substantial or controlling effect or to other grounds not previously presented.

By its own rules, the Court gives itself discretional powers to deny cases with or without opinion on merits. *See*, e.g., Rule 44. However, a court must have jurisdiction before it can deny a case without opinion. "Where there is no jurisdiction, there can be no discretion, for discretion is incident to jurisdiction." *Piper v. Pearson*, 2 Gray 120, cited in *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872).

In the instant case, the denial of certiorari on petitioner's motion to void judgment for lack of jurisdiction was not made on merits. The existence of jurisdiction without a hearing is a violation of due process and equal treatment. The 5th and 14th Amendment due process clauses protect a petitioner from being denied certiorari without a hearing at which the petitioner would be informed of the reasons for the denial and given the opportunity to present his reasons against denial. The hearing need not be a formal hearing. *Board of Curators v. Horowitz*, 435 U.S. 78 (1978).

In Appendix 11-16 of his petition for certiorari, petitioner presents his reasons for lack of fundamental jurisdiction.[1] Petitioner moved the Court to void the lower court judgment for lack of fundamental jurisdiction. "If it appears by *suggestion* of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." *Italics added. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006).

On a suggestion for lack of jurisdiction, jurisdiction cannot be conferred by discretion. Indeed, the requirement of subject matter jurisdiction is held to be so fundamental that a court is required to raise the issue sua sponte and dismiss it if it finds lack of jurisdiction. *Louisville & Nashville RR v. Mottley*, 211 U.S. 149 (1908). The Court's denial of the petition for certiorari without opinion does not inform of the reasons for the denial of petitioner's motion to void judgment for lack of jurisdiction, which cannot be rendered without deciding it. *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206 (1938); *Raley v. Ohio*, 360 U.S. 423, 434-437 (1959).

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[1] A trial court lacks jurisdiction in the fundamental sense "where the type of proceeding . . . is beyond the jurisdiction defined for that particular court by statute *or constitutional provision*." *Italics added. Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 288 (1941).

CONCLUSION

A rehearing is required because the denial of certiorari of petitioner's motion for lack of jurisdiction does not inform petitioner of the reasons for the denial and give him the opportunity to present his reasons against denial. *Horowitz*, supra.

Dated: June 28, 2011

Respectfully submitted,

JAMES CONSTANT, In pro per
1603 Danbury Dr.
Claremont, CA 91711

RULE 44 CERTIFICATE OF COUNSEL

I certify that this petition for rehearing is restricted to the grounds specified in Rule 44 and is presented in good faith and not for delay.

Dated: June 28, 2011

By: _____
JAMES CONSTANT